1966

Utah Cooperative Association, A Utah Corporation v. Wilburn Dale Helm and Mariel. Helm, His Wife : Petition For Rehearing and Brief In Support thereof

In the

Supreme Court of the State of Utah

UTAH COOPERATIVE ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

— vs. —

WILBURN DALE HELM and MARIE L. HELM, his wife,
Defendants and Respondents.

Case No. 10509

Petition for Rehearing and Brief in Support Thereof

BASED UPON THE DECISION AND OPINION OF THE SUPREME COURT OF THE STATE OF UTAH FILED HEREIN ON APRIL 12, 1966 AFFIRMING A SUMMARY JUDGMENT AND ORDER ENTERED BY THE FOURTH DISTRICT COURT FOR UTAH COUNTY.

HON. JOSEPH E. NELSON, *Judge*
HON. R. L. TUCKETT, *Judge*

RAY, RAWLINS, JONES & HENDERSON
By KENT B LINEBAUGH
800 Walker Bank Building
Salt Lake City, Utah
Attorneys for Plaintiff and Appellant

HOWARD & LEWIS
120 East 300 North
Provo, Utah
Attorneys for Respondents

TABLE OF CONTENTS

AUTHORITIES CITED

TABLE OF CONTENTS — (Continued)

In the
Supreme Court of the State of Utah

UTAH COOPERATIVE ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

— vs. —

WILBURN DALE HELM and MARIE L. HELM, his wife,
Defendants and Respondents.

Case No. 10509

Petition for Rehearing

The appellant hereby petitions the above-entitled court for a rehearing of the above-entitled appeal on the ground that said court erred by affirming the trial court's Order denying plaintiff permission to file Count III of its proposed Amended Complaint, which Count states a valid cause of action for reformation, and by affirming the trial court's Order denying plaintiff's motion for an Order requiring plaintiff to make deposits into court pendente lite.

Dated this 30th day of April, 1966.

RAY, RAWLINS, JONES & HENDERSON
By KENT B LINEBAUGH
800 Walker Bank Building
Salt Lake City, Utah
Attorneys for Plaintiff and Appellant

In the
Supreme Court of the State of Utah

UTAH COOPERATIVE ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,
— vs. —
WILBURN DALE HELM and MARIE L. HELM, his wife,
Defendants and Respondents.

Case No. 10509

Brief in Support of Petition for Rehearing

STATEMENT OF THE NATURE OF THE CASE

Originally this was an action for a Declaratory Judgment declaring and determining the meaning of a lease between the plaintiff as lessee and the defendants as lessors or, in the alternative, a reformation of said lease.

DISPOSITION IN LOWER COURT AND THE SUPREME COURT

Summary Judgment was granted in favor of the defendants and the plaintiff's Motions to set aside the Summary Judgment, for permission to file an Amended Complaint and for an Order requiring the plaintiff to make

deposits in court pendente lite were denied. From the Summary Judgment and denial of the plaintiff's Motions, the plaintiff appealed. Upon appeal, the Supreme Court affirmed the trial court, awarding costs to the respondents.

RELIEF SOUGHT

Plaintiff seeks a rehearing on the propriety of denying plaintiff permission to file Count III of its proposed Amended Complaint and the court's refusal to require the plaintiff to make deposits in court pendente lite. Pursuant to said rehearing, the plaintiff seeks an Order granting plaintiff permission to file Count III of its proposed Amended Complaint and an Order requiring the plaintiff to make deposits in court pendente lite.

STATEMENT OF FACTS

On May 5, 1961 the defendants Wilburn Dale Helm and Marie L. Helm, his wife, as lessors, entered into a written lease agreement with the plaintiff, Utah Cooperative Association. (R. 7) The leased property consisted of a service station located on the old State Highway just North of Orem, Utah, and the plaintiff undertook to operate the service station pursuant to the lease agreement. (R. 3, 7, 4)

At the time of entering into the lease, the plaintiff and the defendants were aware that the leased premises would be used by the plaintiff as a service station and

that the new freeway now completed between Lehi and Provo was then being planned. (R. 3, 4, 16, 26)

Upon completion of the contemplated freeway, due to the alteration of the flow of traffic away from the leased premises, the plaintiff maintained to the defendants that certain provisions in the lease allowed the plaintiff to surrender and cancel the lease and be relieved from the payment of rent or any other obligation thereunder. (R. 5, 16, 53) However, the defendants contended that the plaintiff had no right to surrender or cancel the lease and demanded continued payment of the monthly rental. (R. 5, 16, 18, 53) Subsequently, the plaintiff's original Complaint was filed on July 1, 1965, (R. 15, 22) whereby the plaintiff sought a Declaratory Judgment which would relieve the plaintiff of any obligations whatsoever under the lease. Thereafter, the defendants answered the Complaint and moved for Summary Judgment, which judgment was granted in their favor.

Upon notifiication of the Summary Judgment against it, the plaintiff filed a motion to set aside the Summary Judgment, (R. 55) together with motions for permission to file an Amended Complaint, (R. 51) and for an Order requiring the plaintiff to make deposits in court pendente lite. (R. 50) In Count III of the proposed Amended Complaint, the plaintiff set forth an alternative cause of action for reformation of the lease to make it conform to the actual agreement of the parties. (R. 31)

Paragraph 11 of Count III of the proposed Amended Complaint alleges as follows:

> 11. That the following is a true agreement of the parties with reference to paragraph 7 of said lease agreement:
>
> > 7. Lessors shall keep in force at their expense sufficient fire and comprehensive insurance on the building to pay for the repair or construction of said building if it is damaged or destroyed by fire or other casualty, which policy shall contain a loss payable clause in favor of lessee as its interest may appear. If the premises are rendered wholly or partially unfit for occupancy by any such damage or destruction, *or if for any reason, including the substantial or material alteration of the flow of traffic away from the leased premises as a result of the use of the anticipated Interstate Highway No. 15 in the Orem, Utah area, which highway is planned for construction in the Orem, Utah area as of the date of this agreement,* the possession or beneficial use of the premises is interfered with, the rent hereunder shall abate until the premises are fully restored to fitness for occupancy or such interference has ceased. It is understood and agreed that if by reason of any law, ordinance or regulation of properly constituted authority or by injunction, lessee is prevented from using all or any substantial or material part of the property herein leased as a service station for the sale and the storage of gasoline and petroleum products, or if the use of the premises as a service station shall be in any substantial or material manner restricted, *or if the flow of traffic is substantially or materially altered away from the leased*

> *premises as a result of the use of the anticipated Interstate Highway No. 15 in the Orem, Utah area, which highway is planned for construction in the Orem, Utah area as of the date of this agreement,* or should any governmental authority refuse at any time during the term or extension of this lease to grant such permits as may be necessary for the installation of reasonable equipment and operation of said premises as a service station, then the lessee may, at its option, surrender and cancel this lease, remove its improvements and equipment from said property and be relieved from the payment of rent or any other obligation as of the date of such surrender. (Emphasis added) (R. 34)

Paragraphs 7 and 10 of Count III of the proposed Amended Complaint also allege that the mistake as to the meaning of the lease agreement was a mutual mistake between all parties to the lease or, if not a mutual mistake, then the conduct of the defendants in failing to advise the plaintiff that the lease agreement as reduced to writing did not correctly embody the agreement of the parties, was wrongful and fraudulent. (R. 33)

By its motion to the trial court requiring the plaintiff to make deposits in court pendente lite, the plaintiff sought the court's permission to pay into court the $275 per month reserved as rental payments under the terms of the lease. (R. 50)

The plaintiff has not used the leased premises for any purpose whatsoever since January 1, 1965 and since that

date the premises have been vacant and have produced no income to the plaintiff, (R. 53) and although the plaintiff used its best efforts to sublet or otherwise economically use the property, it has been unable to do so since January 1, 1965. (R. 53)

Between January 1, 1965 and the time the plaintiff filed its motion for an order requiring deposits to be made into court pendente lite the plaintiff paid to the defendants the monthly rental of $275 per month for a total of $2750 during which time the plaintiff received no income from the property. (R. 53) The amount of $1100 of the $2750 paid as aforesaid was paid between the time this action was filed on July 1, 1965 and the filing of plaintiff's motion for the requested order. (R. 53, 54)

After a hearing on the plaintiff's motions, the trial court refused to set aside the Summary Judgment and denied the plaintiff's motion for permission to file its proposed Amended Complaint, and also denied the plaintiff's motion for an order requiring the plaintiff to make deposits of the monthly rental in court pending the termination of the litigation. (R. 86)

Upon appeal to the Supreme Court, the trial court's Summary Judgment and Order denying the plaintiff's motions were affirmed in an opinion filed on April 12, 1966. Said opinion makes no comment whatsoever on the failure of the trial court to permit the plaintiff to file Count III of its proposed Amended Complaint which Count, as stated previously, alleges a cause of action for

reformation of the subject lease. Likewise, said opinion makes no reference to the trial court's failure to order the plaintiff to make deposits into court pendente lite.

ARGUMENT

POINT NO. 1

THE SUPREME COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING THE PLAINTIFF PERMISSION TO FILE COUNT III OF PLAINTIFF'S PROPOSED AMENDED COMPLAINT

In the Supreme Court's opinion this case was characterized as an "appeal from a decision that interpreted a service station lease agreement." While such characterization is partially correct, apparently the court overlooked the fact that the plaintiff not only sought interpretation of the lease, but alternatively, the plaintiff sought REFORMATION of the same agreement. To that end the plaintiff sought permission to file an Amended complaint and Count III thereof states a valid cause of action for reformation of the lease between the parties. Adequate grounds for such reformation were alleged inasmuch as paragraph 7 of Count III alleges a mutual mistake on the part of all parties involved, and paragraph 10 of said Count alleges that "if the defendants did not share plaintiff's mistaken belief that the actual agreement of the parties had been reduced to writing then the conduct of the defendants, all and each of them, in failing to advised plaintiff that the lease agreement as reduced to writing did not correctly embody the agreement of

the parties was wrongful and fraudulent." Paragraph 11 then proceeds to allege the true agreement between the parties with regard to the plaintiff's right to a total abatement of rent or termination of the lease agreement.

This jurisdiction recognizes and accepts the well established rule that an instrument is subject to reformation on the ground of mutual mistake or fraud. In *Naisbitt* v. *Hodges,* 6 Ut. 2d 116, 307 P. 2d 620 (1957) Mr. Justice McDonough, writing for a unanimous court, stated:

> "There are numerous cases in this jurisdiction dealing with reformation of an instrument on the ground of mutual mistake. The guiding criteria are well established. Mutual mistake of fact may be defined as error in reducing the concurring intentions of the parties to writing. . . ."

Earlier in *McMahon* v. *Tanner,* 122 Ut. 333, 249 P. 2d 502 (1952), a unanimous Utah court held as follows at 249 P. 2d 506:

> "The principal applicable . . . is well stated in the case of Spirit vs. Albert, 109 Conn. 292, 146 Atlantic 717, 720: 'Where unknown to one of the parties, an instrument contains a mistake rendering it as variance with the prior understanding and agreement of the parties, and the other party learns of this mistake at the time of the execution of the instrument and later seeks to take advantage of it, equity will reform the instrument so as to make it conform to the prior understanding.' "

So far as we are able to determine, the law of the State of Utah is no different today.

Although the plaintiff first attempted to reform the subject lease by way of its proposed Amended Complaint, we fail to perceive any reason why both the trial court and the Supreme Court refused to permit the pleading of the cause of action for reformation. Our Utah Rule of Civil Procedure 15 authorizes amended and supplemental pleadings as follows:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may still amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. (Emphasis added)

Utah Rule of Civil Procedure 8(e) provides as follows:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency, and whether

> based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Also relevant to this inquiry is Utah Rule of Civil Procedure 18(a) which provides in pertinent part as follows:

> (a) Joinder of Claims. The plaintiff in its complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims legal or equitable or both as he may have against an opposing party. . . .

From the foregoing Utah Rules of Civil Procedure it is apparent that Count III of the plaintiff's proposed Amended Complaint was not unacceptable because it was joined with other claims in the proposal, nor because alternative relief was prayed for, nor because the claims described therein may not have been entirely consistent.

More particularly, Rule 15 clearly indicates that permission to amend a pleading shall be liberally granted. As was stated by Justice Wade in *Ballard* v. *Buist,* 8 Ut. 2d 308, 333 P. 2d 1071 (1959):

> It has always been the rule in this State to be liberal in the allowance of amendments to the end that there can be a complete adjudication of the controversy upon the merits and so that justice may be served.

In addition, although it was decided prior to the enactment of our present Rule 15, *Provo City* v. *Claudin,* 91 Ut.

60, 63 P. 2d 570 (1936) contains the following pertinent comment by Justice Wolfe:

> It must be noted that the court may, upon sustaining a demurrer, refuse to permit an amendment to a pleading if it deems no amendment can be made which will circumvent the ruling. . . . In such case, the pleader is virtually out of court, it is as if the court had said, 'your pleading is not good in law and, under the facts as I apprehend they can be pleaded, you cannot state a good action or defense in law.' Naturally, it is not usually done on a first complaint or answer because the court cannot ordinarily know that other facts to make the pleading good cannot be pleaded. And a refusal to permit pleading over where it does not appear positive that no cause of action or defense can be pleaded may run easily into an abuse of discretion.

Upon application of the criteria described by Justice Wolfe, it is submitted that Count III of the plaintiff's proposed Amended Complaint does "state a good action." Thus, the refusal on the part of the trial court and the Supreme Court to permit the pleading of Count III is improper. Unlike Counts I and II of the proposed Amended Complaint, which Counts the Supreme Court considered and rejected in its recent decision, Count III is not defective because the language of the lease agreement is clearly against the plaintiff. On the contrary, the purpose of reforming the lease is to change that which is clear, but does not express the agreement of the parties. Nor does the claim for reformation of the agreement run afoul of the parol evidence rule since that rule is not applicable to an action for reformation. (See *Sine* v.

Harper, 118 Ut. 415, 222 P. 2d 571 (1950) and Degnan, *Parol Evidence — The Utah Version,* 5 Utah Law Review, 158, 175 (1956).)

We simply cannot conceive of any legitimate reason why the trial court and the Supreme Court have refused to permit plaintiff to file its proposed Amended Complaint so far as Count III is concerned. The holding in *Lone Star Motor Imports, Inc.* v. *Citroeon Cars Corporation,* (C.A. 5th, 1961) 288 F. 2d 69, is in point. It was there held that where no grounds whatsoever exist for denial of leave to amend a pleading, the test for abuse of discretion is satisfied and the trial court must be reversed upon appeal. Not having been allowed to file its claim for reformation, the plaintiff has not had the opportunity to present evidence in support thereof. Thus, the refusal to allow prosecution of Count III is tantamount to a dismissal of the cause of action for reformation of the lease without any hearing whatsoever. Surely, such refusal is an abuse of discretion.

In the present case, the plaintiff's motion for leave to file the proposed Amended Complaint was made within ten days after the plaintiff received notice that the defendants' motion for Summary Judgment had been granted. In addition: no prejudice whatsoever would have resulted to the defendants had the plaintiff been allowed to plead Count III as proposed, plaintiff's motion was the first occasion permission to so plead had been sought, the motion was not an attempt to delay the proceedings, nor can it be said the motion was made in bad faith. The

letter as well as the spirit of the law applicable to this issue clearly entitle the plaintiff to a hearing on its claim for reformation of the lease agreement.

POINT NO. 2

THE SUPREME COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION FOR AN ORDER REQUIRING PLAINTIFF TO MAKE DEPOSITS OF THE MONTHLY RENTAL INTO COURT PENDENTE LITE

In the event the plaintiff is not permitted to file Count III of its proposed Amended Complaint as contended for in Point No. 1 of this brief, the issue raised by this Point No. 2 is moot and requires no consideration. However, assuming the court reverses itself as urged and the plaintiff is permitted to file Count III of its proposed Amended Complaint then the plaintiff submits that affirmation of the trial court's Order denying plaintiff's motion for an Order requiring the plaintiff to make deposits of the monthly rental into court pendente lite was erroneous. The reader is directed to the plaintiff's brief on file herein, pp. 26-35, for Points and Authorities in support of plaintiff's contention in this Point No. 2.

CONCLUSION

For those reasons hereinabove set forth the court should grant a rehearing in this case for the purpose of reconsidering only those issues raised by the petition for rehearing. Totally absent from the court's original opinion is any reason why the plaintiff should not be permitted to file Count III of its proposed Amended Complaint and make deposits of the monthly rental into court pendente lite.

Respectfully submitted,

RAY, RAWLINS, JONES & HENDERSON

By KENT B LINEBAUGH
800 Walker Bank Building
Salt Lake City, Utah
Attorneys for Plaintiff and Appellant